

Exhibit A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 WESTPORT INSURANCE
4 CORPORATION,

5 Plaintiff,

6 v.

07-CV-6726 (SHS)

7 PATRICIA HENNESSEY, ESQ., and
8 COHEN, HENNESSEY, BIENSTOCK &
RABIN, P.C., f/k/a COHEN,
HENNESSEY, BIENSTOCK, P.C.,

9 Defendants.

Decision

10 -----x
11 New York, N.Y.
12 September 2, 2008
2:44 p.m.

13 Before:

14 HON. SIDNEY H. STEIN,

District Judge

15 APPEARANCES

16 LEWIS BRISBOIS BISGAARD & SMITH LLP
17 Attorneys for Plaintiff
18 BY: MARK K. ANESH, ESQ.

19 FRIED & EPSTEIN LLP
Attorneys for Defendants
20 BY: JOHN W. FRIED, ESQ.

21 ALSO PRESENT: PAUL C. KURLAND, ESQ., Snow Becker Krauss
22 STACEY GRAHAM, Westport Insurance Corporation
23 HARRIET NEWMAN COHEN, Cohen Hennessey Bienstock
24
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1 (In open court)

2 (Case called)

3 THE CLERK: Counsel, please state your names for the
4 record.

5 MR. ANESH: Mark Anesh, Lewis Brisbois Bisgaard &
6 Smith, for plaintiff Westport Insurance Company.

7 MR. FRIED: John W. Fried, Fried & Epstein LLP, for
8 defendant Patricia Hennessey and Cohen Hennessey Bienstock &
9 Rabin, P.C.

10 THE COURT: And we also have present from Westport
11 Insurance Company Stacey Graham; and from Cohen Hennessey, we
12 have Ms. Cohen.

13 Sir, did you make your appearance as well?

14 MR. KURLAND: Yes. While I'm not appearing in this
15 action, I'm counsel to the defendants here in the underlying
16 malpractice case pending in Westchester County Supreme Court.
17 My name is Paul C. Kurland, K-U-R-L-A-N-D, of Snow Becker
18 Krauss, P.C.

19 THE COURT: All right. Good afternoon. Welcome to
20 all of you. I appreciate the substantial efforts the parties
21 have taken in an attempt to resolve this. Those efforts were
22 unsuccessful. And as indicated, I will proceed to reading a
23 decision on the pending motions. My decision is as follows:

24 Plaintiff Westport Insurance Corporation brings this
25 action for a declaratory judgment that it need not defend nor

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1 indemnify defendants Patricia Hennessey or her firm, Cohen,
2 Hennessey, Bienstock & Rabin, in a malpractice action filed by
3 Jayne Asher against Hennessey and the Cohen Hennessey firm
4 resulting from their legal representation of Ms. Asher in her
5 divorce. Westport contends that defendants "knew or could have
6 reasonably foreseen" that their acts "might be expected to be
7 the basis" for a malpractice claim against them by Ms. Asher
8 prior to the March 14, 2006 effective date of their malpractice
9 insurance policy with Westport, and thus Westport need not
10 indemnify nor defend defendants in that action. In response,
11 Hennessey and the law firm seek partial summary judgment in
12 this action on three of their four counterclaims:

13 (Counterclaim #1) a declaratory judgment that Westport must
14 defend defendants in Ms. Asher's malpractice suit;

15 (Counterclaim #2) a claim alleging that Westport has breached
16 its insurance contract with the defendants by refusing to
17 defend them in the malpractice action; and (Counterclaim #4) an
18 award of attorney's fees in this action.

19 The Court finds that Hennessey and the law firm could
20 not have reasonably foreseen that Ms. Asher's failure to make
21 certain elections concerning her ex-husband's life insurance
22 policies set forth in the agreement resolving the divorce would
23 give rise to a malpractice claim against them. Accordingly,
24 Westport's summary judgment motion is denied, and defendants'
25 motion for partial summary judgment is granted. The Court

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1 heard extensive oral argument on the motions on June 18th of
2 this year.

3 The facts are as follows:

4 Defendants Hennessey and the Cohen Hennessey firm
5 purchased a Lawyers Professional Liability Policy for
6 professional malpractice claims issued by Westport that was to
7 cover defendants for claims made between March 14, 2006 and
8 March 13, 2007. (Plaintiff's 56.1 Statement, ¶¶1 and 2;
9 Defendant's Counterstatement Pursuant to Rule 56.1(a), ¶¶1 and
10 2.) Exclusion B in the 2006 Policy states as follows:

11 This policy does not apply to...

12 B. any CLAIM arising out of any act, error, [or]
13 omission... occurring prior to the effective date of this
14 policy if any INSURED at the effective date knew or could have
15 reasonably foreseen that such act, error, [or] omission...
16 might be expected to be the basis of a CLAIM or suit.

17 (Lawyers Professional Liability Insurance Policy,
18 which is Exhibit A to Plaintiff's 56.1 Statement at 4.)

19 In 2000, Jayne Asher retained Cohen Hennessey to
20 represent her in her divorce from Sanford Asher. Ms. Hennessey
21 was the lawyer primarily responsible for representing
22 Ms. Asher. (Defendants' 56.1, ¶¶1 and 2; Hennessey Affidavit
23 dated November 20, 2007, ¶7.) On or about October 15, 2002,
24 Jayne Asher and Sanford Asher executed a Stipulation of
25 Settlement in their divorce action, which states in part that:

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1 "Wife may, at her option assume, at her expense, the
2 existing term life insurance policy on Husband's life... which
3 has a death benefit of One Million Dollars (\$1,000,000). Wife
4 shall elect, by February 1, 2003, whether she wishes to assume
5 the policy, in which event, Wife shall have sixty (60)
6 additional days, if necessary, to effectuate the transfer of
7 ownership of said policy to herself.

8 "Wife is the owner of a variable ordinary life policy
9 on the life of Husband... which has a death benefit of
10 One Million Dollars (\$1,000,000)... Wife shall transfer the
11 ownership of said policy to Husband unless, by February 1,
12 2003, Wife notifies Husband that she elects to retain ownership
13 of said policy."

14 (Defendants' 56.1(b) ¶¶10-16; Hennessey Affidavit
15 ¶¶11-13, Exhibit 1 to the Hennessey Affidavit at Article IX,
16 ¶¶1 and 2.) On January 28, 2003, Mr. Asher's attorney wrote to
17 Ms. Hennessey that "[w]e are waiting for [Ms. Asher] to make
18 her election regarding the life insurance policies."

19 (Plaintiff's and Defendants' 56.1, ¶13; and Letter to Patricia
20 Hennessey dated January 28, 2003, Exhibit G to Plaintiff's
21 56.1.) Ms. Asher did not elect to retain or assume ownership
22 over either policy by February 1, 2003, which is the date
23 specified in the Stipulation. The citation there is *J.A. v.*
24 *S.A.*, 4 A.D. 3d 248,251 (1st Dep't 2004). Three and one half
25 months later, on May 22nd, 2003, a justice of the Supreme

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1 Court of the State of New York gave Ms. Asher additional time
2 to make her election. (Exhibit 3 to the Hennessey Affidavit.)
3 On February 24, 2004, the Appellate Division, First Department
4 reversed that determination, however, finding that "the
5 stipulation [was] clear and unambiguous in affording the wife
6 until February 1, 2003 to exercise her life insurance options.
7 Clearly, she failed to act within the deadline and thus waived
8 her right of election." *J.A. v. S.A.*, 4 A.D.3d at 251.

9 On or about July 26, 2006, Cohen Hennessey sent
10 Westport a June 29, 2006 letter Hennessey had received from
11 Ms. Asher's attorney, stating that Ms. Asher was damaged by
12 Cohen Hennessey's failure to timely exercise Ms. Asher's right
13 of election as to the insurance policies. (The parties' 56.1
14 Statements, ¶4; Exhibit B to Plaintiff's 56.1, Letter from Paul
15 I. Marx, Esq.) Seven months later, on January 23, 2007,
16 Ms. Asher filed a legal malpractice action against defendants
17 in New York State Supreme Court, alleging that "by reason of
18 defendants' failure to timely exercise the rights of election,
19 Plaintiff was barred from doing so and lost the benefit of the
20 life insurance policies." (56.1 Statements ¶6; and Exhibit D
21 to Plaintiff's 56.1 statement at ¶¶17 and 18.)

22 On March 22, 2007, Westport sent defendants a
23 reservation of rights letter, stating that it was reserving its
24 right to investigate and possibly deny coverage as to
25 Ms. Asher's claims. (56.1 Statement ¶12.) On July 11, 2007,

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1 Westport sent a letter to the defendants stating that it was in
2 fact denying coverage pursuant to Exclusion B of the Policy,
3 because

4 "there is objective evidence that [defendants] were
5 aware of an act, error or omission which [they] knew or could
6 reasonably foresee might be expected to be the basis of a claim
7 or suit against [them] when the February 24, 2004 Appellate
8 Division Order found that Ms. Asher lost any rights to the
9 policies due to the failure to comply with the Stipulation.
10 This was known prior to the Westport policy effective date of
11 March 14, 2006."

12 (56.1 Statements ¶15; Exhibit H to Plaintiff's 56.1
13 Statement.)

14 On July 26, 2007, Westport filed this action, seeking
15 a declaratory judgment absolving it of responsibility to defend
16 or indemnify defendants with respect to the Asher malpractice
17 action. Defendants in turn asserted four counterclaims: (1)
18 Counterclaim #1: seeking a declaratory judgment that Westport
19 is required to defend defendants in the Asher malpractice
20 action; Counterclaim #2: claims that Westport has breached its
21 contract with defendants by disclaiming its duty to defend;
22 Counterclaim #3: claims that Westport has breached its contract
23 with defendants by disclaiming its duty to indemnify; and
24 Counterclaim #4: seeks attorney's fees and expenses in this
25 action.

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1 Westport has now moved for summary judgment for
2 declaratory judgment, arguing that Exclusion B of its coverage
3 policy applies as a matter of law, and that defendants knew or
4 could have reasonably foreseen that Ms. Asher would file a
5 claim against them at least as of February 24, 2004, when the
6 Appellate Division ruled that Ms. Asher could no longer elect
7 ownership of the life insurance policies. In response,
8 Hennessey and the Cohen Hennessey law firm argue that they did
9 not know and could not have known that Ms. Asher would file a
10 suit against them, and they ask this Court to grant a partial
11 summary judgment on three of their four counterclaims.
12 Specifically, on Counterclaim #1, they wanted declaratory
13 judgment that Westport must pay to defend Hennessey and the
14 Cohen Hennessey law firm in Ms. Asher's malpractice suit;
15 Counterclaim #2 seeks a finding that Westport breached its
16 contract with defendants by refusing to defend them in the
17 malpractice action; and Counterclaim #4 seeks an order of
18 attorney's fees, as I've said. As to the third counterclaim,
19 which was breach of contract for Westport's refusal to
20 indemnify, defendants assert that Westport's claim for a
21 declaratory judgment that it need not indemnify defendants is
22 premature, and ask that Westport's action be dismissed without
23 prejudice or stayed insofar as it seeks a declaratory judgment
24 that there is no duty to indemnify until the underlying Asher
25 malpractice suit has been adjudicated.

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1 Let's now turn to the standards on summary judgment.
2 You all know what they are.

3 It's appropriate to grant summary judgment only if the
4 evidence shows that there's no genuine issue of material fact
5 and the moving party is entitled to judgment as a matter of
6 law. *Celotex Corp. v. Catrett*, 477 U.S. 317,322 (1986); *Allen*
7 *v. Coughlin*, 64 F.3d 77,79 (2d Cir. 1995). In determining
8 whether a genuine issue of material fact exists, the Court "is
9 to resolve all ambiguities and draw all permissible factual
10 inferences in favor of the party against whom summary judgment
11 is sought." *Patterson v. County of Oneida*, 375 F.3d 206,219
12 (2d Cir. 2004); see also *LaFond*, 50 F.3d at 171. However, the
13 party opposing summary judgment "may not rely on mere
14 conclusory allegations or speculation, but instead must offer
15 some hard evidence" in support of its factual assertions such
16 that "there is sufficient evidence favoring the nonmoving party
17 for a jury to return a verdict for that party." Those are
18 quotations from *D'Amico v. City of New York*, 132 F.3d 145,149
19 (2d Cir. 1998), and *Golden Pacific Bancorp v. FDIC*, 375 F.3d
20 196,200 (2d Cir. 2004).

21 Now here, both parties have moved, cross-moved for
22 summary judgment and the same legal standards apply. "[E]ach
23 party's motion must be examined on its own merits, and in each
24 case all reasonable inferences must be drawn against the party
25 whose motion is under consideration." That's *Morales v.*

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1 *Quintel Entertainment, Inc.*, 249 F.3d 115,121 (2d Cir. 2001).

2 Now I want to turn to the duty to defend.

3 Under New York law, which is the applicable law here,
4 an insurer has an "exceedingly broad" duty to defend the
5 insured. *Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d
6 131,137 (2006) (quoting *Continental Cas. Co. v. Rapid-American*
7 *Corp.*, 80 N.Y.2d 640,648 (1993), and "[i]f, liberally
8 construed, the claim is within the embrace of the policy, the
9 insurer must come forward to defend its insured no matter how
10 groundless, false or baseless the suit may be." *Id.* (quoting
11 *Ruder & Finn, Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663,670
12 (1981)). Once a duty to defend is triggered, the insurer must
13 continue to defend the insured unless and until the insurer
14 "can 'demonstrate that the allegations of the complaint cast
15 that pleading solely and entirely within the policy exclusions,
16 and further, that the allegations, in toto, are subject to no
17 other interpretation.'" *Id.* (quoting *Allstate Ins. Co. v.*
18 *Mugavero*, 79 N.Y.2d 153,159 (1992)).

19 The allegations in the Asher complaint -- that
20 defendants were negligent by giving Ms. Asher "incorrect and
21 fallacious advice regarding rights of election under the
22 Stipulation" (Asher Complaint ¶19) -- suggest that the claim is
23 "within the embrace of the policy" for professional liability
24 insurance. See *Ruder & Finn*, 52 N.Y.2D at 670-74. Westport
25 relies on Exclusion B to seek the declaratory judgment that it

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1 need not defend or indemnify defendants.

2 So let's now look at the exclusion.

3 To avoid coverage on the basis of an exclusion, the
4 burden is on the insurer to demonstrate the applicability of
5 that exclusion. *Cook*, 7 N.Y.3d at 137; see also *Village of*
6 *Sylvan Beach, N.Y. v. Travelers Indem. Co.*, 55 F.3d 114,115-16
7 (2d Cir. 1995). The insurer must also prove that the exclusion
8 is unambiguous. See *Sea Ins. Co., Ltd. v. Westchester Fire*
9 *Ins. Co.*, 51 F.3d 22,26 (2d Cir. 1995).

10 With respect to the particular exclusion at issue
11 here, the New York Court of Appeals has not yet definitively
12 determined whether an objective standard -- "e.g., could a
13 reasonable lawyer foresee that his act or error might form the
14 basis of a claim" -- or a subjective standard -- "e.g., did the
15 insured lawyer actually believe that his act or error might
16 give rise to a claim" -- applies. *Westport Ins. Co. v.*
17 *Goldberger & Dubin, P.C.*, 2006 U.S. Dist. LEXIS 31329, at *8-9
18 (S.D.N.Y. Mar. 3, 2006) (determining that New York courts would
19 apply an objective standard) aff'd, summary order at 255 Fed.
20 App'x 593 (2d Cir. Nov. 29, 2007). When a lawyer does not
21 inform his insurance company about an incident that leads to a
22 claim, under a subjective standard, the Court must determine
23 whether the insured lawyer thought his client would file a
24 claim; under an objective standard, the Court must determine
25 whether "a reasonable lawyer would know or could reasonably

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1 foresee that [his mistake] might give rise to a malpractice
2 claim." *Id.* at *15-16.

3 Both sides in this action have spent significant
4 portions of their briefing arguing whether the language of
5 Exclusion B is ambiguous and whether the standard the Court
6 should apply is objective or whether it is subjective.
7 Plaintiff contends that Exclusion B is unambiguous and that the
8 objective standard should apply. It contends that because
9 defendants here had knowledge of their allegedly wrongful acts
10 and could reasonably have foreseen a claim which would be made
11 against them prior to the effective date of the policy,
12 plaintiff need not defend or indemnify defendants in the
13 underlying malpractice suit. Defendants contend that Exclusion
14 B should be interpreted under a subjective standard, and
15 because there was no evidence that defendants thought Ms. Asher
16 was planning to sue them, then the exclusion does not apply.
17 Defendants argue alternatively that even if an objective
18 standard applies, Westport's cases are inapposite because they
19 involve lawyers who clearly failed to carry out their
20 responsibilities as attorneys, such as failing to file suits
21 before the statute of limitations expired or failing to
22 prosecute cases.

23 Even under a purely objective standard, plaintiffs
24 have failed to demonstrate to the Court that the defendants
25 knew or should have known that a claim would arise from

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1 Ms. Asher's failure to make her election before February 1,
2 2003. No proof has been adduced that defendants were
3 responsible for electing Ms. Asher's benefits for her or for
4 advising her as to whether or not to make the election. No
5 provision of the Stipulation either permitted or obligated the
6 law firm itself or the attorney on the case, Ms. Hennessey, to
7 exercise Ms. Asher's election to assume the term life policy or
8 retain the variable life policy. (Defendants' 56.1 Statement
9 at ¶¶18-21; and the Hennessey Affidavit ¶13; Exhibit 1 in the
10 Hennessey Affidavit.) The Appellate Division's decision of
11 February 24, 2004 did not involve defendants as part of the
12 opinion and did not even mention or refer to Hennessey or Cohen
13 Hennessey in any way. It stated that "the stipulation is clear
14 and unambiguous in affording the wife until February 1, 2003 to
15 exercise her life insurance options." See *J.A. v. S.A.*, 4
16 A.D.3d at 251. Plaintiff points to the January 28, 2003 letter
17 from Mr. Asher's attorney to Ms. Hennessey, but that letter
18 states that he and his client "were waiting for Jayne [Asher]
19 to make her election regarding the life insurance policies,"
20 and even notes that a copy of the letter had been sent directly
21 to Ms. Asher. (Exhibit H, Plaintiff's 56.1.)

22 Plaintiff argued that first, "a lawyer [needs to]
23 advise his or her client about a pending deadline and the
24 consequences of failing to meet it," and, second, even if the
25 deadline was not part of defendants' original duties, it was

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1 part of their "peripheral duties" in representing Ms. Asher.

2 As to either point, the caselaw plaintiff cites is wholly
3 inapposite to this case.

4 In contending that lawyers must advise clients of a
5 deadline, which is true, plaintiff cites cases involving
6 lawyers who failed to file a case before the applicable statute
7 of limitations ran out, see, for example, *Goldberger & Dubin*,
8 2006 U.S. Dist. LEXIS 31329; *Ingalsbe v. Chicago Ins. Co.*, 270
9 A.D.2d 684,704 (3d Dep't 2000); *Bellefonte Ins. Co. v. Albert*,
10 99 A.D.2d, 947,472 (1st Dep't 1984); or failed to prosecute a
11 case, see *Mt. Airy Ins. Co. v. Thomas*, 954 F.Supp. 1073 (W.D.
12 Pa. 1997); or failed to take other necessary action, all
13 resulting in a case being dismissed, see, e.g., *Sirignano v.*
14 *Chicago Ins. Co.*, 192 F.Supp.2d 199 (S.D.N.Y. 2002) (failure to
15 provide opponent with expert report led to case being taken off
16 trial calendar, and, after a 15-month standstill, the case was
17 dismissed as abandoned); *Fogelson v. Home Ins. Co.*, 129 A.D.2d
18 508,514 (1st Dep't 1987) (attorney's failure to file an answer
19 led to a default judgment against the client.) In those cases,
20 an attorney was retained to undertake some task and failed to
21 do so within the requisite time frame, to the client's
22 detriment. In contrast, here, based on the evidence to date,
23 the law firm was not hired to advise Ms. Asher whether to elect
24 to assume the life insurance policies; it was hired to
25 represent her in her divorce action. There is no evidence that

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1 defendants knew they were responsible for electing Ms. Asher's
2 coverage on her behalf or even advising her as to whether it
3 was in her financial interests to make the election one way or
4 the other -- in fact, all the evidence in this record is to the
5 contrary. Therefore, when Ms. Asher did not elect to purchase
6 Mr. Asher's life insurance policy by the contractual deadline,
7 there is nothing in the record to make defendants aware that
8 they had committed an allegedly negligent act, and therefore
9 they could not have reasonably foreseen that any negligent act
10 would have been the basis of a claim.

11 Similarly, in arguing that lawyers have undefined
12 duties to their clients that are peripheral to those which fall
13 within the duties for which lawyers were retained, the only
14 cases plaintiff cites involve lawyers who were hired to
15 commence workers' compensation proceedings and failed to advise
16 their clients to also file a personal injury action before the
17 statute of limitations ran out. See *Greenwich v. Markoff*, 234
18 A.D.2d, 112 (1st Dep't 1996); *Davis v. Klein*, 224 A.D.2d 196
19 (1st Dep't 1996); *Campbell v. Fine*, 642 N.Y.S.2d 819 (N.Y. Sup.
20 Ct. New York County 1996). Plaintiffs also point to a treatise
21 on legal malpractice which discusses this peripheral duty as a
22 lawyer's obligation to a client regarding legal needs
23 collateral to the original scope of the representation for
24 which a lawyer is obligated to advise his client. See *Mallen &*
25 *Smith*, 1 Legal Malpractice § 8:2 (2008 ed.). The treatise

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1 states that "[t]he controlling standard is whether the remedy
2 or liability should have been apparent to the ordinary lawyer
3 under the circumstances. The rationale is that, as between the
4 client and the lawyer, the latter is much more qualified to
5 recognize and analyze the client's legal needs." *Id.* The cases
6 and the treatise are not on point on this, as they relate
7 specifically to legal duties, such as the duty to advise a
8 client as to the applicable statute of limitations for a
9 separate but related claim, which is, as I said, inapposite
10 here, where the duties to elect the benefits was vested in the
11 client, and even under an objective standard, as noted earlier,
12 there is no evidence that defendants knew or could reasonably
13 have known that they were responsible for electing Ms. Asher's
14 coverage on her behalf or advising her as to whether she should
15 elect those benefits.

16 There is no evidence in this record that defendants
17 should have made an election regarding life insurance on her
18 behalf or even advised her in that regard, and plaintiff has
19 pointed to no source of such a duty apart from the readily
20 distinguishable cases I've just discussed. As a matter of law,
21 a reasonable lawyer in defendants' position would not have
22 known or reasonably foreseen that Ms. Asher's own failure to
23 elect her life insurance benefits might give rise to a
24 malpractice claim, even after the Appellate Division's
25 decision. See *Goldberger*, 2006 U.S. Dist. LEXIS 31329, at

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1 *15-16. This is true even under an objective interpretation of
2 Exclusion B. There are no genuine issues of material fact with
3 regard to the duty to defend on the record, and summary
4 judgment on the duty to defend is denied as to plaintiff and
5 granted as to defendants on their first and second
6 counterclaims.

7 Even if Exclusion B applied, Westport would be
8 required to defend Hennessey and Cohen Hennessey against
9 Ms. Asher's claims that did not relate specifically to the
10 failure to elect the life insurance benefits. See *New York*
11 *Central Mut. Fire Ins. Co. v. Heidelberg*, 108 A.D.2d 1093, 1095
12 (3d Dep't 1985) ("That the complaint 'asserts additional claims
13 which fall outside the policy's general coverage or within its
14 exclusionary provisions' does not free the carrier of this
15 obligation" to defend) (quoting *Seaboard Sur Co. v. Gillette*
16 *Co.*, 64 N.Y.2d 304, 486 (1984)); see also *Ruder & Finn*, 52
17 N.Y.2d at 669. (The duty to defend "includes the defense of
18 those actions in which alternative grounds are asserted, even
19 if some are without the [insurance] protection purchased.")
20 Ms. Asher's complaint claims, for example, that defendants
21 "fail[ed] to provide good, proper, honest and competent legal
22 advice," "breach[ed] the contractual retainer agreement between
23 the parties," and "incorrectly advis[ed] [her] as to the
24 meaning and import of the terms of the Stipulation and in other
25 ways, not yet known, act[ed] negligently." (Complaint ¶19,

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1 Exhibit D to Plaintiff's 56.1 Statement.) Although most of the
2 Asher complaint does indeed focus on defendants' failure to
3 elect the life insurance benefits, her broad allegations would
4 not be subject to Exclusion B, as they do not necessarily arise
5 out of the failure to elect life insurance benefits. The
6 allegations at least "suggest... a reasonable possibility of
7 coverage," and thus Westport has a duty to defend Hennessey and
8 Cohen Hennessey against those allegations in the underlying
9 action. *Cook*, 7 N.Y.3d at 137 (quoting *Rapid-American Corp.*,
10 80 N.Y.2d at 648).

11 I wish to turn now to the duty to indemnify, which is
12 narrower than the duty to defend. See *Ruder & Finn*, 52 N.Y.2d
13 at 669. However, the New York courts have long held that:

14 "[a]n action to declare the insurer's duty to
15 indemnify is premature and does not lie where the complaint in
16 the underlying action alleges several grounds of liability,
17 some of which invoke the coverage of the policy, and where the
18 issues of indemnification and coverage hinge on facts which
19 will necessarily be decided in that underlying action."

20 *Hout v. Coffman*, 126 A.D.2d 973 (4th Dep't 1987); see
21 also *Spoor-Lasher Co. v. Aetna Cas. & Sur. Co.*, 39 N.Y.2d
22 875,876-77 (1976). In the interests of economy and judicial
23 efficiency, a court has the ability to dismiss or stay an
24 insurance company's declaratory judgment action on the issue of
25 indemnity while the underlying action is decided. See *Village*

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1 of *Sylvan Beach*, 55 F.3d at 115-16; *United States Underwriters*
2 *Ins. Co. v. Kum Gang, Inc.*, 443 F.Supp.2d 348,354-55 (E.D.N.Y.
3 1996). In *Kum Gang*, the court heard the portion of the suit
4 relating to the insurers' duty to defend, but declined to
5 exercise jurisdiction over whether the insurers were required
6 to indemnify the policyholder, because that issue was
7 "theoretical... [and] might be made moot by a finding of
8 nonliability in the state court action." *Id.* 354-55.

9 Plaintiff's request for a declaratory judgment that it
10 has no duty to indemnify is denied without prejudice because
11 there has been no determination of liability in the underlying
12 malpractice action.

13 The last area on this motion is the request for
14 attorney's fees.

15 Under New York law, a liability insurer's obligation
16 to defend its policyholder includes a defense against the
17 insurer's own declaratory judgment action. *United States*
18 *Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592,598
19 (2004); see also *Mighty Midgets, Inc. v. Centennial Ins. Co.*,
20 47 N.Y.2d 12,21 (1979); *Am. Home Assurance Co. v. Weissman*, 79
21 A.D.2d 923,924-25 (1st Dep't 1981). "An insured who is 'cast
22 in a defensive posture by the legal steps an insurer takes in
23 an effort to free itself from its policy obligations,' and who
24 prevails on the merits, may recover attorneys' fees incurred in
25 defending against the insurer's action." *City Club Hotel*

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1 (quoting *Mighty Midgets*, 47 N.Y.2d at 21).

2 Westport argues that it has no duty to either defend
3 or indemnify, and it thus should not have a duty to pay
4 defendants' costs in this suit. The Court has already
5 determined that Westport has a duty to defend Hennessey and the
6 Cohen Hennessey law firm in the underlying suit, and thus
7 defendants have prevailed on the merits to that extent.
8 Furthermore, a policyholder is entitled to the cost of
9 defending against an insurer's declaratory judgment action that
10 has put the policyholder on the defensive, even if the insurer
11 did not provide the policyholder with a defense in the
12 underlying action. *City Club Hotel*, 3 N.Y.3d at 598; see also
13 *Mighty Midgets*, 47 N.Y.2d at 21. Westport put defendants on
14 the defensive here, and defendants are entitled to their
15 attorney's fees and costs incurred in defending this action.
16 Summary judgment is granted as to the defendant's fourth
17 counterclaim.

18 In sum, plaintiff's motion for summary judgment
19 seeking a declaration that it has no duty to defend the
20 underlying malpractice action and no duty to indemnify is
21 denied. Defendants' motion for summary judgment declaring that
22 plaintiff has a duty to defend the underlying malpractice
23 action is granted (Counterclaim 1); and defendants' motion for
24 summary judgment on the second and fourth counterclaims is
25 granted. A hearing will be scheduled on what constitutes

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1 reasonable attorney's fees in regard to Counterclaims 2 and 4.

2 That's my decision. I will enter a minute order that
3 says, for the reasons set forth on the record today, the
4 pending motions were decided as set forth in the opinion given
5 orally today.

6 I think what we have to do now is structure the
7 remaining part of the litigation. So I'm going to ask in the
8 first instance that the attorneys attempt to do that and to
9 present me with a schedule of how they see this litigation, or
10 what remains of it, proceeding. If the parties are unable to
11 do that, they should submit to me letters on their positions
12 and I'll bring you in and we'll structure the litigation going
13 forward. So let me give you two weeks to do that, to have a
14 joint proposed schedule in two weeks, or notify me that you're
15 unable to reach an agreement and then I'll bring you in. Or
16 you're unable to reach an agreement and present to me each
17 side's position and I'll bring you in.

18 Is there anything else I can do? All right.

19 MR. ANESH: Yes, your Honor. Just a little
20 clarification, if you don't mind, on prevailing on the merits
21 in this case. I think your Honor will agree that there is a
22 possibility that we could prevail on the merits in this
23 declaratory judgment action once we take discovery. So if we
24 can prevail on the merits, why is an award of attorney's fees
25 in this action granted, if we could still prevail on the

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1 merits?

2 THE COURT: Given the fact that you have the
3 possibility, in your view, of discovery and this so-called
4 statement that they knew about it prior to commencement of the
5 policy date, that's your position; it depends upon future
6 discovery, correct?

7 MR. ANESH: In both the state action that we received
8 and discovery here, we can prevail on the merits.

9 THE COURT: All right. Defense, do you have a
10 response? What Mr. Anesh is really saying, because this action
11 is not over and he hopes to find that smoking gun that he
12 talked about in the settlement discussions that say, you knew
13 in advance of the commencement of this policy date that you
14 were going to be sued, that the client was dissatisfied and you
15 were going to be sued, why should he be obligated, as I think
16 he's correct in the decision as I've read it, for all of the
17 attorney's fees in this litigation? Is there a response?

18 MR. KURLAND: If I may, your Honor.

19 THE COURT: Yes.

20 MR. KURLAND: I think your Honor has made a judgment,
21 a decision that we're entitled to a defense of the underlying
22 action. The insurance company breached their duty by not
23 providing a defense. We have expended all of the money in this
24 lawsuit up to this date, in this lawsuit, Mr. Fried had
25 expended the money based upon their failure to provide a

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1 defense and to bring this action. If they had done what they
2 were supposed to do in accordance with your Honor's decision --

3 THE COURT: No, I understand that, I understand that,
4 but the point Mr. Anesh is raising, I think, is saying in a
5 way, to the extent that the action continues, he hopes to I
6 guess be able to argue otherwise in the future based on what he
7 finds in discovery. Is that correct?

8 MR. ANESH: Yes, your Honor. Based upon what I find
9 in discovery taken in the underlying case and/or the discovery
10 I'm going to take in this case, pursuant to the schedule we
11 have to submit, I could prevail in this case, at which time I
12 wouldn't owe anything. So why am I being forced to pay legal
13 fees in this case now when I could prevail?

14 THE COURT: I understand the point. It's based on
15 future discovery in this case, as you say, or the underlying
16 malpractice case.

17 MR. ANESH: Future outcome of this case.

18 THE COURT: I understand.

19 MR. FRIED: Your Honor, the way that Westport has
20 structured this case, they've in a sense divided it in half.
21 We've now completed the first portion of the case where
22 Westport, by its motions, have sought to deprive us of our duty
23 to defend. The Court has issued an order and a judgment that
24 they're obligated to provide us a defense. We've spent close
25 to \$80,000 in defending that action in this court, with regard

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1 to the duty to defend. The way I understand the Court's
2 decision is that up until today, having obtained a judgment on
3 the duty to defend, we're entitled to an order to recover our
4 attorney's fees for that portion of the case. If at the end of
5 the case -- if at the end of the case Westport should win, then
6 of course we're not going to renew that motion with regard to
7 the second portion of the case. But if we prevail at the end
8 of this case, then we would make a second motion that our
9 attorney's fees be reimbursed from today going forward. And
10 that's what I think the caselaw says, the *Mighty Midgets* case
11 says. When a policyholder is put in a defensive posture by an
12 insurance company seeking to withdraw its obligation to provide
13 a defense, the insurance company has to reimburse the
14 policyholder's expenses.

15 THE COURT: Probably would have made more sense for
16 Westport to move for summary judgment after it had a basis for
17 discovery in this case under its belt. But go ahead.

18 MR. ANESH: Well, your Honor, the reason we didn't is,
19 we thought we had -- based on the objective standard, we would
20 save insurer defense costs. But there is no basis in law to
21 hold us responsible for these fees because we could ultimately
22 prevail in this case. We can win this case. And I believe we
23 will win this case. And there's no basis in law or fact to
24 hold us responsible for legal fees in this case. Yes, your
25 Honor has decided we owe the defense obligation. We're going

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1 to pay for that. We understand that. But there's no basis in
2 law or fact to hold us responsible for fees in this case
3 because we can ultimately prevail in this case.

4 THE COURT: All right. I understand that. I was
5 dealing with the record as I had it. And what you're saying
6 is, it can change over time in connection with discovery that
7 you find. I'm actually correct, I believe, on the record as it
8 exists, but you're raising the point that it can change in the
9 future. That's your real point.

10 MR. FRIED: Your Honor, can I just make one point?

11 THE COURT: Yes.

12 MR. FRIED: You cited in your opinion the *Cook* case
13 from the New York State Court of Appeals. That case makes it
14 explicitly clear that when an insurance company wants to
15 disclaim coverage for defense costs, it's limited by the facts
16 contained in the complaint. They cannot use information
17 outside of the complaint to overcome their obligation to
18 provide a defense. Here, what Westport is doing --

19 THE COURT: You mean in the Asher complaint.

20 MR. FRIED: Correct.

21 THE COURT: Go ahead.

22 MR. FRIED: In the Asher complaint. They have to look
23 within the four squares of the Asher complaint.

24 THE COURT: Right.

25 MR. FRIED: And they can't use information extraneous

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1 to the complaint, discovery information, information outside of
2 that complaint, in order to prove they have no obligation to
3 defend. Here, what you've done is you've looked at the Asher
4 complaint, you've looked at the policy, and you've determined,
5 based upon those two documents, that they have an obligation to
6 defend.

7 THE COURT: Well, yes, that's true, and that's exactly
8 what I had on these cross-motions for summary judgment. He's
9 saying but that can change is what he's saying.

10 MR. FRIED: Well, that could change, but that only
11 affects their obligation to provide indemnification. But even
12 if the Court were to find at the end of the case that they had
13 no obligation to provide a defense, there's nothing in the
14 policy that requires us to reimburse to Westport the monies
15 that they paid to provide us with a defense. And as a
16 consequence, having expended a lot of money to defend their
17 action, to deprive Cohen Hennessey of their right to defense,
18 we should be entitled to our attorney's fees, their attorney's
19 fees under the *Mighty Midgets* case, because they bifurcated
20 this case in half. They've lost the first half. Now they want
21 to try to win the second half. Whether they win the second
22 half or not, I guess through discovery we'll find out. But
23 having lost the first half on the *Mighty Midgets*, we should be,
24 as the Court has ordered, reimbursed the attorney's fees.

25 THE COURT: All right. Mr. Anesh, within a week

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1 submit to me, I guess it would be in the form of a motion to
2 reargue that part of the decision within whatever time period
3 you have. Do it within ten days.

4 MR. ANESH: Can I have by next Friday, your Honor?

5 THE COURT: Sure. And then ten days for a response.
6 To reargue that portion that grants summary judgment on the
7 counterclaim requiring you to pay the costs of this action.

8 MR. ANESH: Yes, your Honor.

9 THE COURT: I want to limit it to that. And I'll take
10 a fresh look at that.

11 MR. ANESH: I understand, your Honor. Thank you, your
12 Honor.

13 MR. FRIED: Thank you, your Honor.

14 MR. KURLAND: Thank you.

15 THE COURT: Thank you.

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